2003 WL 21296817 (Utah App.), 2003 UT App 111
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
Henry T. ZAKHARIAN, Petitioner,
v.
The Honorable Michael K. BURTON, Respondent.
No. 20030151-CA.
April 17, 2003.

Original Proceeding in this Court.
Benjamin A. Hamilton, Salt Lake City, for Petitioner.
Brent M. Johnson, Salt Lake City, for Respondent.

Before Judges JACKSON, BILLINGS, and BENCH.

MEMORANDUM DECISION

PER CURIAM:
*1 Petitioner Henry Zakharian seeks a writ of mandamus directing the Respondent "to grant [a] motion to dismiss all charges ... for constitutional violations of double jeopardy, due process, and equal protection."
Zakharian seeks review of the denial of a motion to dismiss on grounds that rule 4-608 of the Utah Rules of Judicial Administration is unconstitutional. Because Zakharian has no right to appeal this issue under Utah Code Ann. § 78-5-120 (2002), "pursuit of an extraordinary writ is procedurally correct." *Dean v. Henriod,* 975 P.2d 946, 948 (Utah Ct.App.1999). The petition alleges that Respondent abused his discretion by denying the motion to dismiss. Accordingly, the petition invokes rule 65B(d)(2)(A) of the Utah Rules of Civil Procedure.
Granting a writ of mandamus is always a matter of discretion with the appellate court. *See State v. Stirba,* 972 P.2d 918, 920 n. 2 (Utah Ct.App.1998). The petition cannot substitute

for an appeal; thus, it does not authorize the appellate court to exercise the same scope of review as on appeal or to circumvent statutory restrictions on an appeal. *See id.* at 920. Abuse of discretion for purposes of rule 65B(d)(2)(A) writs "must be much more blatant than the garden variety 'abuse of discretion' featured in routine appellate review." *Id.* An appellate court will act to correct only a "gross and flagrant abuse of discretion" or a "particularly egregious and momentous legal error." *Id.* at 923.

A defendant in a criminal case originating in a justice court is entitled to a trial de novo in district court. *See* Utah Code Ann. § 78-5-120(1) (2002). Rule 4-608(4) of the Code of Judicial Administration provides that "[u]pon the filing of the notice of appeal and the issuance of a certificate of probable cause as provided for in the Rules of Criminal Procedure, the judgment of the justice court shall be stayed."

Zakharian was convicted of Driving under the Influence of Alcohol and Possession of Drug Paraphernalia in the South Salt Lake Justice Court, and was again convicted following a trial de novo in Third District Court. Once in district court, Zakharian moved for dismissal of the charges on grounds that application of rule 4-608(4) constituted double jeopardy and denied him due process and equal protection under the law. Zakharian filed this petition after conviction, and after obtaining a stay of the sentence in the district court. Respondent argues that the petition should be dismissed based upon the delay in asserting the claim. We review the petition on its merits based upon the fact that the underlying case is stayed in district court and that court continues to exercise jurisdiction to conduct review hearings.

Zakharian first claims that section 78-5-120 and rule 4-608 violate constitutional guarantees prohibiting double jeopardy. A defendant appealing a justice court judgment has an unconditional right to a trial de novo "without regard to the judgment entered in a justice court." *State v. Hinson,* 966 P.2d 273, 275 (Utah Ct.App.1998). "The district court is not confined to the record before the justice court and need not

defer to the justice court's findings and determinations." *Id.* Following trial de novo, the district court "renders a new, distinct, and independent judgment." *Id.* Zakharian contends that if the justice court judgment is not automatically vacated, rather than stayed, the trial de novo will subject him to double jeopardy by a second trial on the same charges.

*2 The United States Supreme Court has rejected double jeopardy claims pertaining to similar "two tier systems." *See Justices of Boston Mun. Ct. v. Lydon,* 466 U.S. 294, 104 S.Ct. 1805 (1984); *Ludwig v. Massachusetts,* 427 U.S. 618, 96 S.Ct. 2781 (1976); *Colton v. Kentucky,* 407 U.S. 104, 92 S. Ct 1953 (1972). Noting that a defendant in a two tier system is in no danger of prosecution after an acquittal, the Court states that "[t]he decision to secure a new trial rests with the accused alone," who "is in no different position than a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand for a new trial." *Ludwig,* 427 U.S. at 631, 96 S.Ct. at 2788. The Court continued:

The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that a convicted defendant ... may obtain a "reversal" and a new trial without assignment of error in the proceedings at his first trial. Nothing in the Double Jeopardy Clause prohibits a state from affording a defendant two opportunities to avoid conviction and secure an acquittal.

Id. at 632, 96 S.Ct. at 2788-89.

In *Colton,* the Supreme Court rejected a claim that the possibility of a harsher penalty following a trial de novo violated double jeopardy, reasoning that the defendant had the option "to seek a new trial with the slate wiped clean, or to accept the penalty imposed by the inferior court." *Colton,* 407 U.S. at 119, 92 S.Ct. at 1961. In *Lydon,* the Supreme Court adopted the characterization of the second tier proceeding as "part of a single, continuous course of judicial proceedings during which ... a defendant receives more--rather than less--of the process normally extended to criminal

defendants." *Lydon,* 466 U.S. at 310, 104 S.Ct. at 1814. Therefore, the second tier trial did not violate double jeopardy guarantees by providing a defendant with "two opportunities to avoid conviction and secure an acquittal." *Id.* at 312, 104 S.Ct. at 1815.

Zakharian has not demonstrated that Utah's two tier system violates the Double Jeopardy Clause and, specifically, has not demonstrated that the justice court's judgment must be vacated pending appeal. A defendant appealing a justice court conviction has an absolute right to a trial de novo. *See* Utah Code Ann. § 78-5-120. The district court is not bound by the justice court judgment, but it cannot impose a harsher sentence. *See Wisden v. District Court,* 694 P.2d 605, 606 (Utah 1984). Zakharian has not demonstrated that he is entitled to dismissal of the charges.

Zakharian next argues that rule 4-608's requirement to obtain a certificate of probable cause violates due process by establishing a prerequisite to exercising the right to appeal. A defendant appealing a justice court judgment is entitled to a trial de novo without any demonstration of error in the justice court. *See Hinson,* 966 P.2d at 275-76. In this context, we agree it appears unnecessary to require a defendant to demonstrate that the "appeal ... raises substantial issues of law or fact reasonably likely to result in a reversal, an order for a new trial, or a sentence that does not include a term of incarceration in jail or prison." Utah R.Crim. P. 27(f)(2). However, Respondent correctly notes that the burden is the same one imposed in a traditional appeal and that the determination whether to grant or deny a certificate of probable cause has no impact on the outcome of the trial de novo. Although the requirement places a procedural burden on a defendant, we conclude it does not limit the right to appeal through trial de novo.

*3 The claim that a defendant whose case originates in justice court is denied equal protection under the law is without merit. Given the foregoing analysis of two tier systems, allowing the defendant two opportunities for

acquittal does not constitute less favorable treatment. Accordingly, we conclude that the Respondent did not abuse his discretion in denying the motion to dismiss. In the absence of a demonstration that application of rule 4-608 of the Code of Judicial Administration violates Zakharian's substantial constitutional rights, there is no basis from which to conclude that either "gross or flagrant abuse of discretion" or "particularly egregious and momentous legal error" has occurred to justify granting the petition. *State v. Stirba,* 972 P.2d 918, 922 (Utah Ct.App.1998).

We deny the petition for writ of mandamus.

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